Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JAY GREGORY, Sheriff of Patrick County, Virginia,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

and

COMPENSATION BOARD OF THE COMMONWEALTH OF VIRGINIA,
Third-Party Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. DID THE COURT OF APPEALS MISAPPLY THE NOTICE STANDARD ENUNCIATED BY THIS COURT IN KENTUCKY V. GRAHAM, 473 U.S. 159 (1985), AND BRANDON V. HOLT, 469 U.S. 464 (1985)?

2. ASSUMING ARGUENDO THAT THE FOURTH CIRCUIT CORRECTLY FOUND THAT THE COMPENSATION BOARD OF THE COMMONWEALTH OF VIRGINIA HAD NO NOTICE OR OPPORTUNITY TO RESPOND PRIOR TO THE IMPOSITION OF LIABILITY, DID THE FOURTH CIRCUIT ERR IN

REFUSING TO DISMISS THE DAMAGES AWARD FOR FAILURE TO PROPERLY JOIN A NECESSARY PARTY PURSUANT TO RULE 19 OF THE FEDERAL RULES OF CIVIL PROCEDURE?

B. LIST OF PARTIES TO THE PROCEEDING

The parties to these proceedings are the United States of America (hereinafter referred to as "United States) as Petitioner, Jay E. Gregory, Sheriff of Patrick County (hereinafter referred to as "the Sheriff") as Respondent, and the Compensation Board of the Commonwealth of Virginia (hereinafter referred to as "the Board") as Third-Party Respondent.

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D. REFERENCES TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

1. United States v. Gregory, No.83-0094-D (W.D. Va. July 18, 1986)

2. United States v. Gregory, No.83-0094-D (W.D. Va. May 14, 1991)

3. United States v. Gregory, No.83-0094-D (W.D. Va. March 25, 1992)

4. United States v. Gregory, No.83-0094-D (W.D. Va. April 23, 1992)

5. United States v. Gregory, No.83-0094-D (W.D. Va. June 19, 1992)

6. United States v. Gregory, No.83-0094-D (W.D. Va. December 2, 1992)

7. United States v. Gregory, et al., No. 93-1391 (4th Cir. June 8, 1994)

E. STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. The date of the entry of the judgment or decree of the Fourth Circuit Court of Appeals which is sought to be reviewed is June 8, 1994.

2. An order denying the Petitioners Motion for Rehearing and Suggestion for Rehearing en banc was was entered by the

Fourth Circuit on July 1, 1994.

3. This court has jurisdiction to review the judgment or decree of the Fourth Circuit pursuant to 28 USC §1254 and Rule 13 of the Supreme Court of the United States.

F. THE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

1. Rule 19(a) of the Federal Rules of Civil Procedure, provides in pertient part:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the

person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

2. United States Constitution, Amendment xiv.

G. STATEMENT OF THE CASE, INCLUDING BASIS FOR FEDERAL JURISDICTION OF THE COURT OF FIRST INSTANCE

In June, 1983, the United States sued the then Sheriff of Patrick County, Virginia, Jesse Williams, in his official capacity, alleging that he had unlawfully discriminated against several female job applicants for sworn officer positions in violation of Title 7 of the Civil Rights Act of 1964, as amended. 42 U.S.C. Section 2000E, et. seq. The United States sought an injunction against the Sheriff precluding further discrimination and backpay for those allegedly denied

employment. In October, 1983, as part of its discovery process, the United Staes deposed Paul Trible, a then-member of the Compensation Board of the Commonwealth of Virginia. In December, 1983, before the case was tried in the district court, Williams moved for summary judgment pursuant to Rule 19(a) of the Federal Rules of Civil Procedure because the United States had not joined the Board as a Defendant. Initially, the United States opposed the motion contending that the Board was not indispensable. However, upon review of the Trible deposition, the United States changed its opinion and on the last day of trial in January, 1984, attempted to remedy its oversight by moving to join the Board as an additional defendant. The district judge deferred ruling on this motion stating on the record that he was troubled about how he could add the Board "without retrying the

whole case." After trial, the district court granted the Sheriff's motion for a directed verdict holding that deputies in Patrick County were within the personal staff exception of Title 7. United States v. Gregory, 582 F.Supp. 1319 (W.D. Va. 1984) The Fourth Circuit subsequently vacated that judgment and remanded for reconsideration in light of the intervening decision on the scope of the personal staff exception. United States v. Gregory, No. 84-1613, (4th Cir. Oct. 1, 1985). In July, 1986, the district court found that the Sheriff had discriminated against only one complainant and awarded her backpay. It held the applicants for road deputy positions were within the personal staff exception and that maleness was a bona fide occupational qualification for correctional officers. It also denied the still outstanding December, 1983 motion to dismiss for failure to join the

Board stating that although joinder might have been desirable, it was not necessary. United States v. Gregory, No. 83-0094-D (W.D. Va. July 18, 1986) Again, the Fourth Circuit reversed the district court's conclusions on the issue of discrimination. United States v. Gregory, 818 F.2d 1114 (4th Cir.) cert denied, 484 U.S. 847 (1987). On remand, the district court held that the Sheriff had not discriminated against the two remaining female applicants for deputy positions. United States v. Gregory, 726 F.Supp. 640 (W.D. Va. 1988) Again the Fourth Circuit reversed, finding clear evidence of discrimination and remanding the case for an appropriate remedy which would include backpay. United States v. Gregory, 871 F.2d 1239 (4th Cir. 1989), cert denied, 493 U.S. 1020 (1990). After remand, in July, 1990, the Sheriff renewed his motion pursuant to Rule 19 to join the Board as a

party defendant arguing that in the absence of joinder, complete relief could not be accorded to those who were already parties. Although the United States had previously sought to join the Board, it retreated from its prior position and stated merely that it did not oppose the Sheriff's motion. On March 25, 1992, following notice to the Board and a lengthy evidentiary hearing, the district court entered judgment against the Sheriff in his official capacity and granted backpay to the two remaining discrimination victims. On April 14, 1992, the Sheriff renewed his Rule 19 motion to join the Board as a defendant. The Board again opposed the motion and the United States again stated that the dispute was between the Sheriff and the Board alone. In September, 1992, the Sheriff moved yet again for joinder under Rule 19. In support of its motion, the

Sheriff presented an uncontradicted affidavit that the Sheriff's Office had no assets to satisfy the judgment. The Board opposed the motion and the United States again took no position on it. Neither the board nor the United States introduced any affidavits to rebutt the Sheriff's claim that his department had no assets to satisfy the backpay award. After notice to the Board, a hearing was held in November, 1992 on the issue of whether the Board should be joined. At this hearing, the Board was personally present and represented by counsel. Following this hearing and after the submission of briefs by the Board and the Sheriff, the district court granted the Sheriff's motion to join the Board. It further held that the Sheriff of Patrick County was an officer of the Commonwealth and ordered the Board to pay the backpay award. From those rulings, the Board appealed. The Fourth Circuit again reversed the district court finding that "given the peculiar facts of this case, we conclude that the Board

simply was not provided adequate notice of and an opportunity to respond to the United States' suit as required by Brandon and Graham." United States v. Gregory, No. 93-1391, slip op. at 7 (4th Cir. June 8, 1994). It is from this decision that the Petitioner seeks a Writ of Certiorari.

H. ARGUMENT

1. THE FOURTH CIRCUIT MISAPPLIED THE NOTICE STANDARD ENUNCIATED BY THIS COURT IN KENTUCKY V. GRAHAM AND BRANDON V. HOLT, SUPRA.

The Fourth Circuit decision is based on a finding that the Board was not given adequate notice of and an opportunity to respond to the United States' suit. This conclusion arises from the Court's determination "the mere legal fact that a suit against the Sheriff is a suit against the Commonwealth does not constitute notice to the Commonwealth and an opportunity to respond to the allegations made, especially given that in 1983 - just as it does today - the Board had many good reasons to believe under Virginia law that it was not responsible for the Sheriff's

actions." United States v. Gregory, No. 93-1931, slip op. at 7. These conclusions are erroneous for both legal and factual reasons.[1]

The Board has had at least three occasions to participate in the proceeding in the district court prior to the imposition of liability. It failed to take the first two opportunities, but did participate in a full hearing prior to Judge Kiser's order of December 2, 1992 ordering the Board to pay the damage award.

The Board's first opportunity was prior to trial. In Brandon v. Holt, this Court explicitly held that a judgment

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[1]The Fourth Circuit decision does not address the "thorny question" of whether the Commonwealth is the real party in interest in a suit against a Virginia Sheriff. For reasons advanced in his brief and oral argument to the Panel, the conclusion that the Sheriff is, in fact, a State officer is inescapable.

against a public servant in his official capacity imposes liability on the entity that he represents, provided that the public entity received notice and an opportunity to respond. This conclusion, the Court opined, was implicit in at least three prior decisions of that Court beginning with Monell v. New York Department of Social Services, 436 U.S. 658 (1978) and including Hutto v. Finney, 437 U.S. 678 (1978) and Owen v. City of Independence, 445 U.S. 622 (1980). All of these cases antedated the United States' suit against the Sheriff. Given the implicit conclusions of public entity liability for the acts of public servants contained in Monell, Hutto and Owen, it cannot be said that the Board was without notice of its potential liability for the acts of the Sheriff at the time that suit was filed against the Sheriff in 1983.

The Fourth Circuit's statement that

the Board had "many good reasons" to believe it would not be liable for the acts of the Sheriff is inconsistent with Virginia law. Beginning with Burch v. Hardwicke, 71 Va. (30 Gratt.) 24 (1878), the Virginia Supreme Court has clearly categorized a Sheriff as a State officer.

> ... There are many officers, such as city judge, sergeant, clerk, commonwealth's attorney, treasurer, sheriff, high constable and the like, some of whom are recognized by the constitution, while others are not. All these are generally mentioned as city officers, and they are even so designated in the constitution, ... while they are elected or appointed for the city, and while their jurisdiction is confined to the local limits, their duties and functions concern the whole state. They are state agencies or instrumentalities....

71 Va. at 33-34 (emphasis added), cited with approval by the Fourth Circuit in McConnell v. Adams, 829 F.2d 1319, 1327 (4th Cir. 1987). The federal courts in Virginia have relied on the Sheriff's status as a state officer to dismiss

Section 1983 cases brought against him for the operation of local jails. McCoy v. Chesapeake Correctional Center, 788 F.Supp. 890 (E.D. Va. 1992).

In sum, the Board had no good reason to believe, at the time suit was filed in 1983, that it had no potential liability for damages which might be awarded against the Sheriff.

Notice is also inherent in the fact that prior to trial, the United States deposed Charles K. Trible, a member of the Board. The Board was represented at that deposition by the Attorney General. Certainly the fact of the deposition in connection with the suit against the Sheriff, when considered in light of prior decisions of the United States Supreme Court beginning with Monell and the status of the Sheriff as a State officer under Virginia law constituted sufficient notice to the Board of its potential liability

for any damages that may have been assessed against the Sheriff.

The Board had a second notice of potential liability and an opportunity to respond after the trial but well in advance of any finding of liability and the assessment of damages. The United States suit against the Sheriff was filed on June 29, 1983. On the final day of trial, the Sheriff moved to dismiss for failure to join the Commonwealth as an indispensable party pursuant to Rule 19. The United States argued that formal joinder was not necessary, but nevertheless moved to join the State as an additional party defendant. The United States also suggested that the Court defer ruling on the Sheriff's motion until after the trial was completed. Judge Kiser's initial decision in connection with this case, United States v. Gregory, 582 F.Supp. 1319 (W.D. Va. 1984), dismissed

the action on procedural grounds, and did not address the Sheriff's Rule 19 motion to dismiss.

The Rule 19 joinder/non-joinder issue was resurrected by the Sheriff during the hearing on remand which preceded the district court's decision of July 18, 1986. The Court held that formal joinder of the entity represented by the Sheriff was unnecessary.

In the wake of the district court decision of July 18, 1986, the Commonwealth, acting through the Board, without objection, paid all monies awarded to the United States as backpay for Stephanie Ressell, and for the Sheriff's attorney's fees in defense of that case. That portion of Judge Kiser's order recited above was not appealed by any party.

The Rule 19 joinder/non-joinder issue remained in repose until July 13, 1990

after the Fourth Circuit's third remand at which time the Sheriff renewed his motion to join the Board. Copies of his motion were served on the Executive Secretary of the Board and the Attorney General's office. At that time it was clear that the only issues to be resolved were the amount of backpay to which the individual claimants were entitled and who was to pay. On May 14, 1991, the district court provisionally denied all then-pending motions for joinder.

Between May 14, 1991 and March 25, 1992, the date the district court liquidated the backpay awards to the individual claimants, extensive discovery and a two-day trial were conducted. The Board did not at any time elect to participate in these hearings despite prior notice of the Sheriff's attempt to join it for purposes of payment.

A third opportunity for the Board to

participate arose on April 14, 1992, when the Sheriff renewed his motion to join the Board as a party defendant. In all subsequent proceedings, the Board participated through counsel. On June 19, 1992, the district court entered an order reserving ruling on the Sheriff's motion to join the Board "pending defendant's identification of all proper parties." On September 11, 1992, the Sheriff, after identifying the proper parties to be named to effectuate joinder of the State, renewed his motion for joinder.[2] On December 2, 1992, following a full hearing in which the Board participated, the district court granted the Sheriff's motion for joinder and ordered the Board to pay to the United States the award made

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[2]No motion was made by any party to join the County of Patrick or the Patrick County Board of Supervisors as parties to the action after January 20, 1984.

on behalf of the individual claimants. From April, 1992 through December, 1992, the Board was given notice and availed itself of the opportunity to respond. The Board participated fully in these hearings both on brief and oral argument. The Board clearly had notice of its potential liability prior to the determination of the damage award.[3]

In sum, the Board, despite long standing notice of potential liability ignored two opportunities to participate prior to the setting of the damage figure. The fact that it did not choose to participate does not mean that it was not given the opportunity to do so. It is uncontradicted that the Board did have

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[3]No complaint has been made that counsel for the Sheriff did not diligently and competently represent the Sheriff on the issue of liability and the amount of damages.

notice of and availed itself of an opportunity to participate fully in the proceedings in the district court prior to any finding of liability on its part. The Sheriff submits that the notice and opportunity to respond afforded to the Board prior to finding the Board liable is all that is required by the law, and that the Panel decision to the contrary is erroneous and should be reversed.

An additional reason for reinstating the decision of the district court rests on finality. The Fourth Circuit's resolution of this issue opens the door to a continuation of what has already been a lengthy and tedious litigation. The district court will ultimately revisit the issue of who, as between the Sheriff and the Board, will ultimately be responsible for the award of backpay. There is no valid reason to believe that the responsible entity will be a party other

than the Board, and it serves no purpose to perpetuate the litigation to address an issue that was properly decided by the district court.

2. ASSUMING ARGUENDO THAT THE FOURTH CIRCUIT'S FINDING THAT THE BOARD HAD NO NOTICE OR OPPORTUNITY TO RESPOND IS CORRECT, THE PROPER REMEDY IS A DISMISSAL OF THE DAMAGES AWARD FOR FAILURE TO PROPERLY JOIN A NECESSARY PARTY PURSUANT TO RULE 19 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 19 of the Federal Rules of Civil Procedure requires joinder of all persons who are subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action if, in the person's absence, complete relief cannot be accorded among those already parties. Rule 19(a), Federal Rules of Civil Procedure. The test for determining indispensability is two-pronged: (1) can relief be afforded to the Plaintiff without the presence of the other party; and (2) can the case be

decided on its merits without prejudice to the other party? Willis v. Semmes, Bowen & Semmes, 441 F.Supp. 1235 (E.D. Va. 1977). In the instant case, the answer to both questions is no.

It is uncontradicted that the Board was and is a person subject to service of process and its joinder would not deprive the court of jurisdiction. It was also apparent in 1983 that under Virginia law the Sheriff represented the entity of the Commonwealth of Virginia and that the Commonwealth would be liable for his actions under Monell and its progeny. The Sheriff raised the non-joinder issue during trial in 1983, but it was not until the last day of that trial that the United States made any effort to join the Board as a party. Counsel for the United States recognized during the trial that without the Board as a party, full relief might not be accorded to the parties:

MR. GADZICHOWSKE: Your Honor, the plaintiff (United States) has moved the court, pursuant to Rule 19(a) ... to join and add as parties defendant ... the Compensation Board. However, since the purpose of the motion is to insure that complete relief is afforded to those persons whom the court may find are the individual victims of discrimination, this court may wish to defer ruling on this motion until after trial .... the compensation board may ... be a person in whose absence complete relief cannot be accorded among those already in the suit ... the court has the discretion to do - to either - has the discretion under Rule 19(b) either to go ahead with the proceedings with the case or to dismiss the action.

THE COURT: That's the part that bothers me, Mr. Gadzichowske. That discretion has been pretty well removed because we have gone ahead with the case.

The uncontradicted affidavit of the Sheriff establishes that the Sheriff's Department as an entity has no assets available to satisfy the judgment. Indeed, the only funding mechanism which is or was available for the purpose of providing that relief is the Board.

The failure of the United States to

join the Board as a party at the time suit was filed in 1983 cannot be justified by any legal principle in effect at the time. Indeed, as the Supreme Court noted in Brandon v. Holt

> The complaint in this case was filed on February 27, 1978, before Monroe v. Pape was overruled; this explains why the City of Memphis was not named as a defendant in this case.

469 U.S. at 466 (emphasis added).

Monroe was overruled by Monell in 1978. In 1983, there would be no excuse for the failure of the United States to name the Board as a defendant. Indeed, the United States failed to name any entity other than the Sheriff in his official capacity as a defendant. Because of the absence of the Board as a party to the litigation, complete relief cannot be accorded among those already parties and the rights of the Board were prejudiced by its absence. In this case, dismissal of

the damage claim is proper under Rule 19.

I. CONCLUSION

For each of the foregoing reasons, it is respectfully requested that this matter be reheard en banc in accordance with Rules 35 and 40 of the Federal Rules of Appellate Procedure.

J. APPENDIX

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Respectfully submitted,

JAY GREGORY, Sheriff of Patrick County

By _____
Anthony P. Giorno

Anthony P. Giorno
Counsel for Petitioner
P. O. Box 1076
Stuart, Virginia 24171

CERTIFICATE OF SERVICE

I, Anthony P. Giorno, counsel for Petitioner, do hereby certify that I have this the 13th day of October, 1994, mailed a true and exact copy of the foregoing Petition for Writ for Certiorari to Lisa Carol Wilson and Jessica Dunsay Silver, counsel for the Respondent, U.S. Department of Justice, Employment Litigation Section, Post Office Box 65968, Washington, D.C. 20035-5968, John Patrick Griffin, counsel for the Third-party Respondent, State Compensation Board, 101 N. Eighth Street, Richmond, Virginia 23219, and the Solicitor General, (via UPS next day air) Department of Justice, Washington, D.C. 20530.

Anthony P. Giorno

APPENDIX

1

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAY GREGORY, Sheriff,
Defendant-Appellee,

v.

COMPENSATION BOARD OF THE COMMONWEALTH OF VIRGINIA,
Third-Party Defendant-Appellant.

No. 93-1391

Appeal from the United States District Court
for the Western District of Virginia, at Danville.
Jackson L. Kiser, Chief District Judge.
(CA-83-94-D)

Argued: March 7, 1994

Decided: June 8, 1994

Before HALL, MURNAGHAN, and LUTTIG, Circuit Judges.

Reversed and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: John Patrick Griffin, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. Lisa Carol Wilson, UNITED STATES DEPARTMENT

OF JUSTICE, Washington, D.C., for Appellee United States; Anthony Paul Giorno, Stuart, Virginia, for Appellee Gregory. **ON BRIEF:** Stephen D. Rosenthal, Attorney General of Virginia, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellant. James P. Turner, Acting Assistant Attorney General, Jessica Dunsay Silver, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee United States.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

The Sheriff of Patrick County, Virginia, was found to have discriminated against certain female job applicants in violation of Title VII of the Civil Rights Act of 1964, as amended, and was ordered to pay damages in excess of $100,000 to the victims of his discrimination. *After* liability had been imposed on the Sheriff in his official capacity, almost 10 years after the suit had been instituted, the district court joined the Compensation Board of the Commonwealth of Virginia (the "Board") as a third-party defendant under Rule 19(a) of the Federal Rules of Civil Procedure, and ordered the Board to pay the damages assessed against the Sheriff. The Board appeals from the district court's order of its joinder and imposition of liability. Because the Board did not have sufficient notice and an opportunity to respond to the United States' suit before it was ordered to pay the damages already awarded, we reverse.

I.

In June 1983, the United States sued the then-Sheriff of Patrick County, Virginia, Jesse Williams, in his official capacity, alleging that he had unlawfully discriminated against several female job applicants for sworn officer positions, in violation of Title VII of the Civil

Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* The United States sought, *inter alia*, an injunction against the Sheriff from further discrimination and back pay for those allegedly denied employment. In November 1983, appellee Jay Gregory defeated Williams in the sheriff's election and, in January 1984, was substituted as a defendant.

In December 1983, Williams moved for summary judgment, in part because the United States had not joined as a defendant the Board, which Williams claimed was an indispensable party to the litigation. At the time, the United States opposed the motion, contending that the Board was not indispensable. After further discovery, however, the United States learned that the Board reimbursed Patrick County for the salaries and expenses incurred in running the Sheriff's Office.[1] It therefore moved on the last day of trial in January 1984 to join the Board, as well as the Patrick County Board of Supervisors, as additional defendants. The district court deferred ruling on this motion, stating not surprisingly, that it was "troubled about how [it] could add these parties without retrying the whole case." J.A. at 36.

After trial, the district court granted Gregory's motion for a directed verdict, holding that deputy sheriffs were within the "personal staff" exemption of Title VII. This court subsequently vacated that judgment and remanded for reconsideration in light of an intervening decision on the scope of the "personal staff" exemption. *United States* v. *Gregory*, No. 84-1613 (4th Cir. Oct. 1, 1985). In July 1986, the district court found that the Sheriff had discriminated against only one complainant and awarded her back pay. It held that

[1]The precise scheme by which the Commonwealth of Virginia funds sheriffs' expenses is somewhat complicated. During the first quarter of every year, each sheriff submits a proposed budget to the Board. The Board reviews the submitted budgets, and then allocates the General Assembly's lump-sum appropriation to each locality based on population and workload. The manner in which the Board pays out the Commonwealth's funds is through *reimbursement*. In the employment context, the salaries of a sheriff's employees are first paid by the county. The county then certifies to the Board that those funds have been paid, whereupon the Board authorizes the Commonwealth Department of the Treasury to issue a check to the county. *See* Supplemental Appendix at 11.

the applicants for road deputy positions were within the personal staff exemption, and that maleness was a bona fide occupational qualification (BFOQ) for correctional officers. It also denied the still outstanding December 1983 motion to dismiss for failure to join the Board, stating that although joinder might have been desirable, it was not necessary. On appeal of this judgment, the Fourth Circuit reversed the district court's conclusions as to both the road deputies and the correctional officers. *See United States* v. *Gregory*, 818 F.2d 1114, 1116-18 (4th Cir.), *cert. denied*, 484 U.S. 847 (1987).

On remand, the district court held that the Sheriff had not discriminated against two remaining female applicants for deputy positions. Again this court reversed, the panel finding clear evidence of discrimination, and remanding the case for an appropriate remedy, which would include back pay. *United States* v. *Gregory*, 871 F.2d 1239 (4th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990).

In July 1990, Gregory moved, pursuant to Rule 19 of the Federal Rules of Civil Procedure, to join the Board as a party defendant, arguing that in the absence of joinder, complete relief could not be accorded those who were already parties. J.A. at 72. The Board objected to the motion. Although the United States had previously sought to join the Board, it retreated from its prior position and stated merely that it did not oppose Gregory's motion. *Id.* at 74. The United States also denied Gregory's claim that complete relief could not be accorded in the Board's absence, arguing that backpay was "rightly payable" by the Sheriff as well. *Id.* at 74-75. In May 1991, the district court held that the joinder motion was "procedurally inappropriate" and observed that "the proper procedure would be to proceed with the present defendant, the Sheriff of Patrick County, as the sole defendant and render such judgment as is appropriate in the case. After the judgment is rendered, the United States may then use the processes of this Court to effect collection of any amounts due [it]." *Id.* at 76-77.

On March 25, 1992, the district court entered judgment against Gregory in his official capacity, ordering the Sheriff enjoined from further discrimination and granting back pay to the two remaining discrimination victims. *Id.* at 78-81. An April 23, 1992 order calculated the total award at $118,114, plus interest running from the March 25, 1992 date of judgment. *Id.* at 105. On April 14, 1992, Gregory

renewed his Rule 19 motion to join the Board as a defendant. *Id.* at 106. The Board again opposed the motion, and the United States again stated that the dispute was between Gregory and the Board alone. *Id.* In June 1992, the district court ordered the case stricken from its active docket, with the proviso that it would be reinstated "on the motion of either party for the purpose of enforcement of judgment." *Id.* at 115. The court again deferred ruling on the joinder motion "for the purposes of execution of judgment" until such time as all proper parties had been identified. *Id.* at 119.

In September 1992, Gregory moved yet again for joinder under Rule 19; this time he termed his motion one to add "the Commonwealth of Virginia, by and through the Comptroller of the Commonwealth of Virginia and the members of the [Board]." *Id.* at 120. An accompanying affidavit represented that the Sheriff's office had no assets to satisfy the judgment. *Id.* at 127. Predictably, the Board opposed the motion, and the United States again took no position on it. *Id.* at 122. After a hearing in November 1992, the district court granted Gregory's motion to join the Board. It also held that the Sheriff of Patrick County was an officer of the Commonwealth and therefore that the Commonwealth was liable for his discrimination. The Commonwealth was ordered to pay the Sheriff's damages. *Id.* at 143-45. From these rulings, the Board now appeals.[2]

II.

On appeal, both the United States and Gregory claim that consideration of the joinder issue is unnecessary, on the grounds that the Sher-

[2]As a threshold matter, we reject Gregory's contention that the Board's notice of appeal was deficient. The Board appealed from the district court's February 2, 1993 order clarifying its December 2, 1992 order that joined the Board and instructed the Commonwealth to pay the Sheriff's damages. *Id.* at 150. In the February 2, 1993 order, the district court "reiterate[d]" its prior decision that the Commonwealth was liable. *Id.* at 149. Hence, Gregory's statement that "[n]either the order nor the Board's motion revisits the issue resolved ... on December 2, 1992 and challenged on brief by the Board, that being the liability of the State for the damages assessed against the Sheriff," Appellee's Brief at 5, is simply incorrect.

iff was sued in his official capacity, and therefore that the entity he represents, which they contend is the Commonwealth, was always the real party in interest in the litigation. *See* Appellee's Brief at 7 ("[T]he Sheriff and the State [*sic*] are the *same* entity."); Brief of the United States at 20-21 ("Although the district court joined the State Compensation Board under Rule 19(a), we believe that an analysis of Rule 19(a) is not necessary in this case.... [T]he district court order is based upon the conclusion that the Sheriff was acting as a state official, this systematically [*sic*] makes the Board liable for any monetary remedy resulting from the Sheriff's discriminatory conduct."); *see also id.* at 11 ("[T]he Board is not a separate entity from the Sheriff and, therefore, joinder is unnecessary.").

We need not decide in this case the thorny question of whether the Commonwealth of Virginia is the real party in interest in an official-capacity suit against one of the Commonwealth's sheriffs. Even assuming that it is, the Commonwealth still must have had notice and an opportunity to respond for it to be held liable for the actions of its agents. In *Brandon* v. *Holt*, 469 U.S. 464 (1985), in the course of summarizing past decisions involving official capacity suits, the Supreme Court stated:

> In at least three recent cases arising under § 1983, we have plainly implied that a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents *provided, of course, the public entity received notice and an opportunity to respond.* We now make that point explicit.

Id. at 471-72 (emphasis added).[3] Likewise, in *Kentucky* v. *Graham*, 473 U.S. 159 (1985), the Supreme Court explained that,

> *[a]s long as the government entity receives notice and an opportunity to respond*, an official-capacity suit is, in all

[3]In *Brandon*, the Court allowed the plaintiffs to amend their pleadings on appeal to name the City of Memphis as a party, but it specifically noted that "the Police Department and the city received notice; no claim is made that the Director of Police and the city were without due notice of the proceedings." *Id.* at 472 n.20.

> respects other than name, to be treated as a suit against the entity [of which an officer is an agent].

Id. at 166 (emphasis added). Given the particular facts of this case, and due in large part to the vacillation of the United States and Gregory as to whether the Board should have been added, we conclude that the Board simply was not provided adequate notice of, and an opportunity to respond to, the United States' suit, as required by *Brandon* and *Graham*.

In imposing liability on the Commonwealth, the district court asserted, without explanation, that no notice rights had been violated because "[a] suit against a state officer is tantamount to a suit against the state itself." J.A. at 145. In their briefs, appellees have not attempted to enlarge upon this conclusion. The United States, for example, has stated merely that "the Commonwealth has had sufficient notice of the Title VII lawsuit since it was filed by the United States in 1983." Brief of the United States at 20.

The mere legal fact (assuming it is such here) that a suit against the Sheriff is a suit against the Commonwealth does not constitute notice to the Commonwealth and an opportunity to respond to the allegations made, especially given that in 1983 — just as it does today — the Board had many good reasons to believe under Virginia law that it was not responsible for the Sheriff's actions. The office of a Virginia sheriff is created by Article VII, Section 4 of the Virginia Constitution, which provides:

> **County and city officers.** — There shall be elected by the qualified voters of each county and city a treasurer, a sheriff, an attorney for the Commonwealth, a clerk, who shall be clerk of the court in the office of which deeds are recorded, and a commissioner of revenue. The duties and compensation of such officers shall be prescribed by general law or special act.

VA. CONST. Article VII, § 4. Virginia courts have consistently interpreted this constitutional provision as rendering Virginia sheriffs independent "constitutional" officers, who are beholden neither to local governing bodies, nor to the Commonwealth, but rather only to

the voters who elected them. *See Hilton* v. *Amburgey*, 198 Va. 727, 728, 96 S.E.2d 151, 152 (1957) ("Sheriffs . . . do not hold their offices by virtue of authority of the General Assembly or by virtue of authority of a municipality or county."); *Narrows Grocery Co.* v. *Bailey*, 161 Va. 278, 284, 170 S.E. 730, 732 (1933) (sheriffs are constitutional officers); *Sherman* v. *City of Richmond*, 543 F. Supp. 447, 449 (E.D. Va. 1982) ("[N]either the City of Richmond nor the Commonwealth of Virginia is responsible for the actions of the Richmond Sheriff's Department."); *see also Olivo* v. *Mapp*, 838 F. Supp. 259, 261-62 (E.D. Va. 1993) (holding that sheriff acts as independent officer when making employment decisions); *Jenkins* v. *Weatherholtz*, 719 F. Supp. 468, 469 (W.D. Va. 1989), *aff'd. in relevant part*, 909 F.2d 105 (4th Cir. 1990) (noting "unique" scheme under which Virginia sheriffs are independent officers); VA. CODE. ANN. § 24.2-202 *et seq.* (distinguishing among elections for "statewide," "local," and "constitutional" offices); 1990 Att'y Gen. Ann. Rep. 21, 22 (stating that sheriffs are neither Commonwealth nor local government employees). Consistent with this unique status of the Sheriff under Virginia law, the Commonwealth exercises virtually no control over the day-to-day operations of its sheriffs' offices. That the Commonwealth would not necessarily have been on notice that it might potentially be liable for damages owed by the Sheriff is confirmed by the fact that the United States itself believed that the Board was not an indispensable party. J.A. at 36-37.

As for what additional procedural safeguards might have been provided, it is relevant to contrast the United States' conduct toward the Board in this case with the opportunities provided the Commonwealth in *Kilgore* v. *McClelland*, 637 F. Supp. 1253, 1257-58 (W.D. Va. 1986), *aff'd. in relevant part*, *McConnell* v. *Adams*, 829 F.2d 1319 (4th Cir. 1987), *cert. denied sub nom. Virginia ex rel. State Bd. of Elections* v. *Kilgore*, 486 U.S. 1006 (1988). In *Kilgore*, certain local Virginia electoral board members and general registrars were sued under section 1983 in their official capacities, thus raising the question of whether the Commonwealth was responsible for their allegedly unconstitutional actions. The district court specifically recognized the significance of *Brandon*'s holding that in official capacity suits, the government entity must have received notice and an opportunity to respond. *See id.* at 1257. It thus extensively analyzed the notice issue and found that the plaintiffs' complaints had

also named the Secretary of the State Board of Elections as a defendant; that the Secretary was represented by the Office of the Attorney General; and that the Commonwealth had been allowed to appear, file a brief, and make oral argument before trial as *amicus curiae*. *See id.* Attorneys for the Commonwealth also participated in a hearing on post-trial motions, after which they were allowed to file additional briefs. *See id.* at 1257-58.

In this case, by contrast, the litigation proceeded for six years, and Title VII liability was imposed, before the Board was even contacted. When the Board finally was contacted, it was for the sole purpose of shifting what had already been determined to be the Sheriff's liability to the Board, as indemnitor. During the crucial years of trial and appeal, the Board's interests were never represented. The Board was never able to contest, for example, whether the discrimination at issue occurred, or whether the victims attempted to obtain other employment in mitigation of damages, or whether the periods for which backpay was awarded were accurate. Gregory's attorney certainly cannot be said to have advanced the Board's interests; in fact, he moved for dismissal based on the fact that the Commonwealth had not been joined and was not represented.

Given the manner in which this litigation proceeded, countenancing the imposition of Title VII liability on the Board would necessitate stretching the procedural laxity permitted in official-capacity suits so far as to violate even the most elemental requirements of procedural fairness expressly required by the Supreme Court in *Brandon* and *Graham*.[4] This we refuse to do.

[4]Our conclusion in this regard is not affected by the facts that in early 1984, a Board member named Trible was deposed on the question of how Virginia sheriffs' offices are funded, and that the Board, pursuant to a 1989 *ex parte* state court order, has reimbursed Patrick County for some of Sheriff Gregory's legal fees and a prior backpay award. Even if these facts could constitute sufficient notice of the underlying suit to support liability against the Commonwealth, there is no indication that the Commonwealth ever had, as it did in *McConnell*, the requisite "opportunity to respond" to the United States' allegations of discrimination.

The judgment of the district court, joining the Board as a third-party defendant after judgment already had been entered on the underlying discrimination claim and ordering it to pay the damages awarded against the Patrick County Sheriff, is reversed, and the case is remanded to the district court.[5] On remand, the United States, as it did originally, may fully avail itself of the processes of the district court to execute on its judgment against the Sheriff's Office; it may not, however, proceed directly against the Commonwealth of Virginia. As the United States has consistently maintained, the ultimate responsibility for payment of the damage award in this particular case is a matter between the Sheriff and the Commonwealth.

REVERSED AND REMANDED

[5]Because of our disposition of the Board's appeal, we do not reach the Board's alternative arguments under the Tenth and Eleventh Amendments.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Civil Action No. 83-0094-D
SHERIFF JAY E. GREGORY, Defendant.	)	ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby ADJUDGED AND ORDERED that the defendant's motion to join the Compensation Board of the Commonwealth of Virginia as a third-party defendant is GRANTED. It is further ordered that the Commonwealth must pay the damages assessed against the sheriff as set forth in this Court's prior decision.

The clerk is instructed to strike this case from the docket and send a certified copy of this order and accompanying memorandum opinion to all counsel of record.

ENTERED this 2nd day of December,

1992.

/s/ Jackson L. Kiser
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
	)	Civil Action
v.	)	No. 83-0094-D
SHERIFF JAY E. GREGORY, Defendant.	)	

Memorandum Opinion
By: Jackson L. Kiser, Judge
United States District Court

The United States prevailed in a Title VII suit filed against the Sheriff of Patrick County, Virginia on behalf of several women who alleged discriminatory hiring practices by the sheriff when hiring deputies. After damages were assessed, the sheriff filed a motion to join the Compensation Board of the Commonwealth of Virginia ("Commonwealth") as a third-party defendant under Rule 19(a) of the Federal Rules of Civil Procedure. Finding merit with the sheriff's arguments, I will grant this motion to join the Commonwealth and order

that the Commonwealth pay the sheriff's damages in the underlying action.

Discussion

The critical question in this case is whether the sheriff in his official capacity has a sufficient nexus with the Commonwealth to require the payment of the money judgments rendered against him from the state fisc. Based on an examination of state law, I find that a sufficient nexus exists. Dotson v. Chester, 937 F.2d 920 (4th Cir. 1991).

In objecting to the motion for joinder, the Commonwealth argues that as a constitutional officer, the sheriff enjoys substantial autonomy from the state and therefore he should not look to the state to pay his damages. It asserts that he is an arm of Patrick County and as such, the county (and the voters who elected him) should bear the financial burden for his misdeeds. It further argues that imposing

this financial burden on the state would violate its Tenth and Eleventh Amendment rights under the Constitution. Finally, the Commownealth argues that joinder at this late stage of the proceeings would violate its due process rights. I find no merit to any of these arguments.

The sheriff maintains a closer nexum with the Commonwealth than he maintains with Patrick County, particularly with regard to the duties of his office and with regard to employment matters. The Commonwealth pays the salaries and expenses of the sheriff and his deputies. Va. Code Ann. §14.1-79 (1992). The Commonwealth provides such fringe benefits as insurance to the sheriff and his deputies. Id. at §2.1-526.8:1. Patrick County contributes nothing to the sheriff's budget. State statutes empower the sheriff to hire and discharge his deputies and require him to refrain from

discriminating in making hiring decisions. Id. at §15.1-48; 15.1-48.1. His primary law enforcement duties involve state statutes, not county ordinances. The Commonwealth has failed to demonstrate the existence of similar financial and statutory connections between the sheriff and Patrick County. In light of this evidence, the sheriff appears to be far more closely connected to the Commonwealth than to Patrick County. Joinder of the Commonwealth as a third-party defendant is therefore warranted. See McConnell v. Adams, 829 F.2d 1319, 1327 (4th Cir. 1987), cert denied, 486 U.S. 1006 (1988) (the fact that voter registrars are paid by the state supports finding that they are officers of state rather than locality); Burch v. Hardwicke, 71 Va. (30 Gratt.) 24, 35-36 (1878) (cited by McConnell and holding that the local chief of police is a state rather than a local

employee).

The short answer to the Commonwealth's Tenth and Eleventh Amendment arguments is that, pursuant to its powers under the Fourteenth Amendment and the Supremacy Clause of Article VI of the Constitution, Congress abrogated these amendments when it enacted Title VII of the Civil Rights Act of 1964.

Finally, contrary to the Commonwealth's assertions, joinder at this stage of the proceeding does not violate its rights of notice and an opportunity to be heard. A suit against a state officer is tantamount to a suit against the state itself. As such, no due process rights have been violated. See Kentucky v. Graham, 473 U.S. 159 (1985).

Conclusion

I find that the sheriff is an officer of the Commonwealth for purposes of this matter and as such, he is entitled to join

the Commonwealth as a third-party defendant. The Commonwealth is directed to pay the sheriff's damages to the plaintiffs in accordance with the earlier decision of this court.

/s/ Jackson L. Kiser
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 1, 1994

No. 93-1391
CA-83-94-D

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

JAY GREGORY, Sheriff,
Defendant - Appellee

v.

COMPENSATION BOARD OF THE COMMONWEALTH OF VIRGINIA,
Third Party Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition

for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK